

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Application of Wisconsin Energy Corporation for
Approval to Acquire the Outstanding Common Stock
of Integrys Energy Group, Inc.

Docket No. 9400-YO-100

**REBUTTAL TESTIMONY
OF NILAKSH KOTHARI ON BEHALF OF
GREAT LAKES UTILITIES**

1 **Q. Please state your name, affiliation and business address.**

2 A. Nilaksh Kothari. I am the general manager of Manitowoc Public Utilities (MPU) and the
3 Administrative Manager of Great Lakes Utilities (GLU). My business address is 1303 S.
4 8th Street, Manitowoc, Wisconsin.

5 **Q. Did you previously submit testimony in this proceeding?**

6 A. Yes. I submitted direct testimony on GLU's behalf to discuss GLU's two central
7 concerns over the proposed acquisition. The first has to do with the fact that the
8 projected benefits of the transaction touted by the company seem outweighed by the
9 potential risk to customers of future increases in purchased power costs. The second has
10 to do with the negative effects associated with the combined company's acquisition of a
11 majority interest in ATC.

12 **Q. What is the purpose of your rebuttal testimony?**

13 A. I have read portions of the testimony by PSCW staff witnesses Pilo and Hubert, as well
14 as portions of the rebuttal testimony submitted by WEC witnesses Leverett and Lauber. I
15 wish to comment specifically on the aspects of their testimony that touch on the concerns
16 mentioned above.

1 **Q. Can you elaborate on the cost concern you have raised?**

2 A. Certainly. The concern I raised in my direct testimony was on the potential effects of the
3 “rate levelization” that would occur in the event that WEC’s two independent utility
4 subsidiaries, Wisconsin Public Service Corporation (WPSC) and Wisconsin Energy
5 Power Company (WEPCO) were to be merged. I sponsored an affidavit from Gary Price,
6 a wholesale rate specialist, who showed that levelization could increase the cost of
7 wholesale power to GLU under its WPSC contract by as much as 20%. Mr. Price has
8 since been formally designated as a witness in this proceeding. To address that concern,
9 GLU Witness Mark Lowry proposed a transaction condition whereby the companies
10 would simply be precluded from consolidating their electric subsidiaries for a period of
11 5-10 years. PSCW Staff witness Hubert discussed a similar concern about the risks of
12 rate levelization, and pointed out that the Applicants’ promise to “confer” with
13 Commission staff and other affected parties prior to any merger filing was rather weak
14 (Direct-PSC-Hubert-18). To strengthen this commitment, Ms. Hubert suggests that the
15 applicant be required to develop a proposal to address any resulting rate disparity created
16 by a proposed merger that would be “acceptable to the parties.” She also proposes that
17 the Commission prohibit the applicant from consummating a proposed merger without
18 such a mutually acceptable proposal, at least for a period of 5 to 10 years (Direct-PSC-
19 Hubert-19).

20 **Q. How did WEC respond to the conditions proposed by Mr. Lowry and Ms. Hubert?**

21 A. WEC witness Lauber reiterated that the company would only propose an action to
22 levelize rates “only when and if it can be shown to be in the best interests of customers”
23 and that in such a circumstance, the company would commit to “following all applicable

1 laws and conferring with stakeholders if and when we propose to merge utilities or
2 levelize rates” (Rebuttal-WEC-Lauber -13). However, Mr. Lauber indicated that the
3 applicant would not be able to commit to developing a proposal that would be
4 “acceptable to the parties” because it is impossible to know in advance whether a
5 consensus among all the parties can be reached (Id.).

6 **Q. What is GLU’s response to this commitment?**

7 A. GLU continues to support the notion of a 5-10 year prohibition against any utility
8 subsidiary merger or any other proposal that would have the effect of blending rates since
9 such a prohibition would eliminate the uncertainty Mr. Lauber describes with respect to
10 achieving stakeholder consensus on mitigating any resulting rate concerns. In the
11 absence of such a prohibition, GLU would expect to be included in substantive
12 stakeholder discussions with the applicant prior to any formal merger filing, which, in
13 GLU’s understanding, would be required both at the state and federal level. As I
14 indicated in my direct testimony, GLU is a wholesale customer of both WEPCO and
15 WPSC under long term power supply agreements. We believe that a serious commitment
16 on WEC’s part to engage its power supply customers in meaningful discussions prior to
17 any formal utility merger filing would increase the likelihood of reaching an agreement
18 with them on how best to mitigate the rate impacts of consolidation.

19 **Q. Please summarize GLU’s concern with respect to the impact of the proposed**
20 **acquisition on ATC.**

21 A. In our testimony on behalf of GLU, Mr. Lowry and I raised concerns about the potential
22 impact of WEC's majority ownership interest in ATC. We pointed out that ATC costs
23 have steadily increased over the years and emphasized the importance of protecting

1 transmission system efficiency and maintaining geographic diversity. We proposed
2 several conditions to address those concerns, including divestment, creation of a voting
3 trust to be administered by non-investor-owned utilities, and granting a seat on the
4 ATCMI Board of Directors to a non-investor-owned utility, such as GLU.

5 **Q. Are these concerns shared by other parties?**

6 A. Yes. PSCW staff witness Pilo discussed various market-power related risks associated
7 with WEC's ability to exercise majority control over ATC, and PSCW witness Hubert
8 discussed how WEC could exercise "informal" influence over ATC through relative size,
9 financial power, or career influence in ways that would not benefit Wisconsin customers.
10 To address these concerns, Ms. Huber proposed extending WEC's voting limitation to all
11 issues, including "fundamental corporate matters." She also advocated imposing certain
12 restrictions to limit WEC's ability to influence selection and nomination of directors on
13 the ATCMI Board of Directors (Direct-PSC-Hubert -29), and suggested a mechanism to
14 reduce WEC's investment level in ATC to 34% over a period of several years, at the end
15 of which any excess ownership interest above a level set by the Commission could be
16 sold off to another member or outside investors (Direct-PSC-Hubert -32). Mr. Pilo also
17 advocated establishing a process to investigate divestment of WEC's interest in ATC.

18 **Q. Would GLU support such measures to limit ATC's influence?**

19 A. Yes. The proposed conditions put forward by Ms. Hubert and Mr. Pilo are consistent
20 with the approaches suggested in my direct testimony and that of GLU witness Lowry.

21 **Q. Do you agree with WEC witness Leverett that such measures are unnecessary in**
22 **light of WEC's voluntary commitment to limit its voting interest to 34%?**

1 A. No. Mr. Leverett claims that WEC and Integrys “highly value” the independent and
2 collaborative manner in which ATC has planned and managed the transmission network
3 and suggests that WEC’s proposal to limit its voting power to the 34% currently
4 exercised by Integrys will result in the control of ATC being *more* distributed after the
5 acquisition (Rebuttal-WEC-Leverett-3). This ignores the “indirect” influences discussed
6 by Ms. Hubert. To use just one example cited by Ms. Hubert, WEC’s proposed voting
7 limitation would not preclude the company from negotiating with a third party to
8 purchase a controlling interest in ATC and then using its 60% majority to effect the sale
9 (Direct-PSC-Hubert-26). As Ms. Huber points out, it would also not preclude the
10 company from exerting influence to shape changes to ATC’s operating documents (id.),
11 and it would not be transferable in the event WEC sold some or all of its interest in ATC
12 to a successor entity (Direct-PSC-Huber-29-30). Given the potential market value of
13 WEC’s ownership interest in the company,¹ and its cash needs post-acquisition,² it is not
14 unreasonable to expect that WEC’s majority control over ATC will increase the
15 probability of ATC-related transfers to third parties, or an IPO, that may be more in the
16 interest of WEC shareholders than ATC transmission customers.

17 **Q. Are there other reasons why you disagree with Mr. Leverett on the sufficiency of**
18 **WEC’s ATC-related conditions?**

19 A. Yes. Mr. Leverett’s view seems to presume that GLU’s primary concern is to protect its
20 own economic interests (or more precisely, those of its members that own ATC shares),
21 which, as Mr. Leverett points out, are already protected by ATC’s governing documents

¹ WEC’s final S-4 filing with the SEC (provided in response to 2-CUB-20, PSC Ref#:224992 at 81), includes the results of a financial advisor’s analysis of the value of Integrys’s business segments that set the value of Integrys’ ownership interest in ATC in a range of between 1 and 1.19 billion dollars.

² According to Mr. Lauber the Company is planning to borrow \$1.5 billion of new debt to fund the acquisition (Direct-WEC-Lauber-4).

1 (Rebuttal-WEC-Leverett-12). In fact, GLU's central concerns with respect to ATC are
2 much broader.

3 **Q. Please elaborate.**

4 A. My direct testimony points out that MPU customers have seen on average increase of
5 about 25% per year in transmission charges. Mr. Lowry's testimony points out that
6 ATC's annual revenue requirements have more than doubled since 2000 and discusses
7 why the proposed acquisition exacerbates concerns about transmission cost containment
8 and the efficiency of the transmission system. (Lowry at 7-9). The measures GLU has
9 proposed -- in particular, exercising control of the 26% WEC interest by means of a
10 voting trust made up of non-investor-owned entities and assigning a Board seat to a non-
11 investor-owned entity such as GLU -- are designed to increase the influence on ATC of
12 entities whose primary concerns are for a competitive bulk power market and
13 transmission cost containment. WEC's voting restriction does not address these issues,
14 even if, as Mr. Leverett maintains, it would have the effect of nominally increasing the
15 voting interest held by non-WEC shareholders, including municipal owners.

16 **Q. Mr. Leverett points out that GLU is the only utility raising these issues. If WEC's**
17 **ability to exercise influence over ATC is such a significant concern, why haven't**
18 **ATC's other owners raised it?**

19 A. I can't speak for ATC's other owners. I would point out, however, that several of ATC's
20 largest owners share ownership interests in substantial generation assets with WEC. In
21 addition, all of these owners currently hold seats on ATCMI's Board of Directors. Since
22 many important decisions regarding the planning and operation of ATC occur at the
23 Board level, it may be that ATC's other owners feel their interests are already adequately

1 represented. In my view, this underscores the potential merit of granting an entity like
2 GLU, whose primary focus is on system cost and efficiency -- and which does not need
3 to utilize its ATC investment to meet shareholder expectations -- a seat at the table.
4 Moreover, contrary to Mr. Leverett's testimony, increasing customer-oriented influence
5 on ATC and representation on the ATC Board seems quite consistent with the terms and
6 conditions with which ATC was formed since the statutes mandate a diversity of
7 directors, including four independent directors.³

8 **Q. Do you agree with Mr. Leverett that an owner's ability to influence ATC's planning**
9 **and construction activities is limited?**

10 A. Yes, with respect to the regional transmission system as a whole. GLU understands that
11 transmission planning and construction activity is governed by a regional planning
12 process overseen by MISO and that there are instances where ATC-recommended
13 projects are ultimately rejected through that process. However, as I mentioned in my
14 direct testimony, the ATC 10-Year Plan, which is approved by the Board of Directors,
15 includes numerous local transmission upgrades that are not part of the regional planning
16 process. I understand, as well, that the Board has power over the affairs and business of
17 the company under the Bylaws, which powers include internal project approvals,
18 acquisitions, and project development (ATC response to PSCW Data Request 2.04(b),
19 PSC Ref# : 225204).

20 **Q. Do you have any other concerns about WEC's proposed voting limitation?**

³ The ATC Board of Directors currently has 10 directors, which, in addition to Mr. Leverett, include representatives of three other investor-owned utilities; ATC's current Chairman; WPPI Energy; and the four independent directors required by the statutes. One seat of the eleven authorized by the Bylaws remains open (ATC response to PSCW Data Request 2.13, PSC Ref# : 225204).

1 A. Yes. Notwithstanding Mr. Leverett's attempt to restate and clarify WEC's proposal in
2 his rebuttal testimony, I still have questions about how WEC's condition would be
3 implemented and enforced. Outside of indicating that the voting limitation would be
4 written into the state and federal approval orders as binding on WEC, it is not clear to me
5 how it will actually be put into effect. Like Mr. Leverett, I am not an attorney, and am
6 simply unaware of how such commitments are implemented in other corporations. To
7 the extent that such a commitment requires a shareholder agreement or amendment to
8 ATC's existing formation documents, an ancillary condition that could be required by the
9 Commission in this proceeding is the presentation of such an agreement or amendment,
10 for which approval of ATC's owners would be required.

11 **Q. Does that conclude your rebuttal testimony?**

12 A. Yes.

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